

STATEMENT OF
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THE HUMANE SOCIETY OF THE UNITED STATES
TO THE
HOUSE RESOURCES COMMITTEE
SUBCOMMITTEE ON FISHERIES CONSERVATION,
WILDLIFE AND OCEANS
REGARDING GENERAL
REAUTHORIZATION ISSUES FOR
THE MARINE MAMMAL PROTECTION ACT
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Mr. Chairman, members of the Subcommittee, my name is Sharon Young and I am the Field Director for Marine Issues for The Humane Society of the United States (HSUS). On behalf of The HSUS, the International Wildlife Coalition, Earth Island Institute and their more than 7 million members and constituents, I am grateful for the opportunity to present our views on the implementation of the Marine Mammal Protection Act (MMPA) and suggestions for changes that might improve the MMPA's ability to protect marine mammals.

BACKGROUND

Between 1992 and 1994, The HSUS participated in an ad hoc stakeholder negotiation that resulted in proposals to Congress for the Amendments to the MMPA that were enacted in 1994. Since that time we have served on a number of appointed committees, working groups and take reduction teams that have arisen from the implementation of the many provisions that were added to the MMPA in 1994. We have also testified a number of times before this and other House Committees regarding the implementation of various portions of the MMPA, most recently in an April 2000 hearing on oversight of the Take Reduction Team process.

One of the questions I was asked to address in this hearing is whether the changes in 1994 have had a positive effect on human-related interactions with marine mammals. I think that the answer is mixed. The Amendments included a number of important provisions. Their primary accomplishment was that for the first time since the 1972 passage of the MMPA, measurable standards and objectives were established to help achieve the goals that were desired by the American people. In particular the Amendments provided an objective measure of understanding of the likely impacts of

human-related mortality on marine mammals that is known as the Potential Biological Removal Level, or PBR. The 1994 Amendments established a process to bring stakeholders to a common table to share information and work toward development of solutions to those situations in which unsustainable levels of mortality in commercial fisheries are occurring. They provided deadlines to ensure timely enactment of management plans to reduce unsustainable levels of mortality. They established a process to address concerns about nuisance pinnipeds (seals and sea lions) that were thought to be having a demonstrably negative effect on endangered fish stocks. They also streamlined the process for obtaining scientific research permits. Additionally, the Amendments included provisions pertaining to hunting of polar bears, the care of captive marine mammals, and the co-management of marine mammals by native peoples. The success of these measures, however, has been tempered by a variety of actions and inaction by the National Marine Fisheries Service (NMFS) and failures in budgeting and enforcement. I would like to address each of these issues separately.

Establishment of Objective Standards for Reducing Fishery Related Mortality

Potential Biological Removal Level (PBR)

Among the principal accomplishments of the 1994 Amendments was the development of the concept of PBR. The formula that was used to obtain PBR was developed by scientists to ensure a precautionary approach to managing our interactions with marine mammals. The PBR formula recognized the uncertainties inherent in understanding the life history and population dynamics of marine mammals. Their marine habitat makes it easy to under-count them or to assume that animals that are widely distributed along a coast are parts of the same population, when in fact they are from separate stocks that require separate management strategies. We know little about the reproductive rates of most marine mammals, and we often know less than we should about levels and sources of mortality to populations. Since 1994, the principles underlying PBR have been adopted by other nations as well as they have sought to manage their own nation's interactions with marine mammals. Congress and the National Marine Fisheries Service deserve to be commended for developing an approach that is conservative and precautionary in its approach. This sort of approach (PBR) helps guarantee that we do not repeat the sorry history demonstrated by fishery management in many areas of the country where fish stocks have crashed and economic hardship has resulted as a result of non-precautionary approaches to management. The American public cares deeply about marine mammals, and PBR is an important means of ensuring protection and promoting growth in diminished populations.

Zero Mortality Rate Goal (ZMRG)

In 1972, the MMPA included a goal stating that fishery interactions with marine mammals should be reduced to "insignificant levels that are approaching a zero mortality and serious injury rate." [16 USC 1371 (a)(2)] This has become widely known as the zero mortality rate goal or ZMRG. This goal is important, as it provides a commitment to ensuring that wasteful practices do not result in unnecessary death or injury of marine mammals - a goal that has long been, and still is, supported by the American people. Goals are by definition: "an end that one tries to attain." ZMRG is a goal, not an objective. While goals and objectives may seem similar, we can look to the field of education to see how they are differentiated. In education, goals are broad principles toward which one strives, such as teaching children to approach one another with attitudes that are not prejudiced. Objectives are measurable standards, such as teaching them to use terms that are not

derogatory to races or sexes when they speak. In the case of interactions with marine mammals, the MMPA strives toward the goal of reducing marine mammal mortalities to levels that are biologically insignificant; not the objective of absolute zero. This goal acknowledges that some incidental mortality may occur, but the phrasing reflects the desire of the American people to reduce mortality and serious injury to levels that are as low as is feasible. We often hear Americans speak in scathing terms of other nations that catch marine mammals in fishing nets without qualms. Striving toward the zero mortality rate goal assures us of "clean" fisheries of which the U.S. can be proud. It is a goal that should remain in the MMPA.

Take Reduction Teams and Reduction of Mortality in Marine Mammal Stocks

The 1994 Amendments established, for the first time, a process designed to include input from all parties with a stake in the management of fishery interactions with marine mammals. The Amendments ensured that stakeholders were represented in advising management decisions. They also stipulated priorities for convening teams to address stocks or fisheries with the most serious levels of interactions. The highest priority was given to situations in which fisheries interacted with strategic stocks of marine mammals. Strategic stocks were those that were listed under the Endangered Species Act as threatened or endangered, or were listed under the MMPA as depleted or were sustaining levels of interactions with fisheries that exceeded the PBR for the stock or stocks. Take reduction teams are charged with producing a plan to reduce mortality to below PBR with six months of implementation. [Section 118(f)(5)(A)]

Under the schedule established in the MMPA Amendments when they were enacted in May 1994, fisheries should have been at or below PBR by October 1996. Because of the extremely high levels of mortality of harbor porpoise in gillnet fisheries in the Gulf of Maine, Congress made special provisions for this fishery. The MMPA provided that the Secretary may "modify the time period required for compliance with section 118 (f)(5)(A), but in no case may such modification extend the date of compliance beyond April 1, 1997." [Section 120 (j)(2)]

With that in mind, the NMFS first convened a team to address mortality of harbor porpoise in the Gulf of Maine. This stock was subjected to mortality more than three times the PBR. NMFS then convened a team to address mortality of endangered large whales in the Atlantic, as levels of human-related mortality in North Atlantic right whales were unsustainable, and other endangered whales such as humpback whales and fin whales were also entangled in gillnet and lobster gear used along the U.S. east coast. Other teams that were convened included those for both the east coast and west coast driftnet and/or longline fisheries that interacted with offshore cetaceans including pilot whales and oceanic dolphins.

The HSUS testified in greater depth in April 2000 as to the fate of these teams, but I would like to summarize what has been a needlessly contentious process. The MMPA Amendments provided a procedure and specific deadlines. Despite this, all take reduction teams were convened well after the legally mandated date. Because of delays within the NMFS, no fisheries were able to comply with the MMPA deadlines for reducing their interactions with strategic stocks to below PBR by October 1996. In fact, no take reduction plans had even been published by this date. Gulf of Maine harbor porpoise were still being killed at a rate almost three times their PBR when the April 1997 deadline came and went without publication of any take reduction plan.

When the NMFS reported its 1995 activities to Congress, it stated that a "coordination process" to

"initiate" Teams was begun in September 1995. The report states that they had contracted with a facilitator who was to be responsible for convening six (6) take reduction teams during 1996 to address the mortality of the strategic stocks whose PBR was exceeded. In the report, NMFS stated that these six teams would be "in order of priority: Gulf of Maine stock (population) of harbor porpoise; Atlantic offshore cetaceans; Pacific offshore cetaceans; and the Atlantic baleen whales (humpback and northern right whales)." Furthermore they reported that "[t]he development of [Teams] for three other stocks: the Atlantic coastal stock of bottlenose dolphins; and the eastern and western stocks of Steller sea lions, *is also being considered*." We have emphasized the last four words, as these stock are all strategic stocks with known fishery interactions. Bottlenose dolphins were being killed in numbers exceeding their PBR and were a depleted stock; therefore a take reduction team was mandatory. Steller sea lions were declining in portions of their range and portions of the stock have been designated as endangered or threatened.

Even if allowance is made for the fact that the stock assessments were late in development, thereby delaying the convening of take reduction teams, the MMPA states that take teams must be established "at the earliest possible time (not later than 30 days) after the Secretary issues a final stock assessment." Despite this clear mandate, NMFS did not convene the first take reduction team until February 1996. As of the date of this testimony, NMFS has convened only four of the six teams that they themselves had identified as having "the highest priority for the development of take reduction plans to reduce incidental bycatch of strategic stocks." Almost six years after the publication of the first stock assessment, there are still no take reduction plans for coastal stocks of bottlenose dolphins or for Steller sea lions in Alaska. The bottlenose dolphin team, which has been formed, has not yet officially met. Of the teams that have met, there have been mixed results.

The Pacific Offshore Cetacean Team

This team was convened in February 1996 to address the mortality of multiple stocks of marine mammals in the Pacific driftnet fishery. It submitted a plan as mandated in August 1996. The NMFS published the draft and final plans in a timely manner and in early 1997 the plan was implemented. Since that time, its measures have apparently been effective in reducing mortality in the Pacific driftnet fishery. While there have been some issues of compliance by the fishery with some portions of the take reduction plan, the NMFS has gone forward to address these problems with education programs and enforcement and this team's efforts appear to have been a success. The same cannot be said of the other take reduction teams.

Gulf of Maine Harbor Porpoise

Both the harbor porpoise teams reached basic consensus on plans to reduce mortality by mid-1997. Despite this, NMFS did not publish a plan until litigation forced them to act in 1999. Since that time, the mortality of harbor porpoise has dropped to approximately the PBR level, although The HSUS remains concerned that this is largely a result of Fishery Management Council related closures for the purposes of groundfish management rather than as a result of the provisions of the take reduction plan.

The Atlantic Offshore Cetacean Take Reduction Team

This team initially had three fisheries represented on the Take Reduction Team. During the negotiation process, the NMFS disallowed one of the fisheries, the Pair Trawl Fishery. No plan was

published under the MMPA for the remaining two fisheries and one of them, the pelagic driftnet fishery, was disallowed in 1999 without benefit of a take reduction plan. The plan for the Atlantic longline fishery was never published, although portions of the plan were adopted under the Fishery Management Plan for the fishery. The team has never been reconvened, and within the past two months, team members have been notified that the team is being disbanded for a period of approximately three years while the NMFS gathers additional data. This is an unconscionable decision.

Data in the NMFS' own stock assessments for east coast marine mammal stocks for several years have indicated that the longline fishery continues to inflict unsupportable and illegal levels of mortality and serious injury on a number of strategic stocks. Furthermore, additional trawl fisheries such as the Squid, Mackerel and Butterfish trawl fishery are also killing or seriously injuring hundreds of oceanic dolphins. For example: the PBR for common dolphins is 227 animals, but the combined mortality due to offshore fisheries is 406 - almost double the PBR. The PBR for pilot whales is 108 although fishery-related mortality is 245 per year - more than twice the PBR. Mortality of other species, such as Atlantic white-sided dolphins, varies from year to year as to whether it is over or just under PBR. Clearly the NMFS has a legal obligation to reconvene this Take Reduction Team as required by the MMPA.

Atlantic Large Whale Take Reduction Team

This team was convened to address the mortality of a number of species of large baleen whales: north Atlantic right whales, humpback whales, fin whales and minke whales. The major focus of the team was the mortality and serious injury of right whales, the most critically endangered species of large whale. The team was convened in August 6, 1996, following a lawsuit by Greenworld. The task of this team was difficult because, although the likelihood of any particular lobster pot entangling a whale was extremely low, the likelihood of a whale getting entangled in some lobster pot or gillnet was extremely high. With 300 or fewer right whales remaining, and evidence mounting that the population is in decline, it was (and remains) urgent that measures be taken to alter current fishing practices that entangle whales.

The NMFS published a take reduction plan in the wake of both litigation and appeals by fishermen to Congress. This plan has been a resounding failure. In its most recent biological opinions on the affected fisheries, NMFS has stated that the take reduction plan (which is based on current best fishing practice) was "inadequate to avoid jeopardy to right whales." This month, they published proposed gear modifications and a proposal for emergency response to aggregations of right whales that are currently subject to a 30-day public comment period. They also published an advanced notice of proposed rulemaking to consider implementation of additional seasonal restrictions in areas where right whales are predictably found outside of critical habitat. We have serious reservations about these measures, many of which request voluntary actions by fishermen. The NMFS continues to place its hopes in disentanglement response. Although several whales have been successfully disentangled, others have died or were lost subsequent to attempts to disentangle them and have not been seen since. Within the past two years an adult female died of grotesque injuries resulting from her entanglement, and an adult male (Churchill - who was the subject of many well-publicized disentanglement attempts) has finally disappeared after being seen lying motionless at the surface, emaciated and with his head drooping.

Clearly the promise of research and the reliance on disentanglement have not been adequate.

Measures contained in the plan to prevent disentanglement have failed and newly proposed measures are of questionable promise.

Given the history of failure by the NMFS to act on a timely basis and in the face of a mounting death toll in right whales, The HSUS filed suit in the year 2000 against the NMFS for violations of both the ESA and the MMPA. It is with reluctance that we move in this direction; however, the history of the take reduction team process to date indicates that without litigation or threat of litigation, little is accomplished, even when the statutory requirements are perfectly clear and the body count of animals continues to rise. In our most recent court appearance, Judge Douglas Woodlock, of the First District Court of the United States, castigated the NMFS for countless delays and deliberate vagary in its proposals. He characterized their actions as "the 'mañana' approach," further stating: "the approach you have chosen forces courts to act and you have only yourselves to blame." Indeed the Take Reduction process has not failed right whales, it is the NMFS that has failed them.

Coastal Stocks of Atlantic Bottlenose Dolphins

The most recent team to be convened will address the mortality of bottlenose dolphins in gillnet fisheries in the mid-Atlantic. This team has not yet officially met and is long overdue. In its report to Congress for 1996 (released October 1997), NMFS stated that it had not yet convened a Mid-Atlantic Team; however, "NMFS expects to convene this team in the spring of 1997 to address incidental takes of harbor porpoise and bottlenose dolphins in ocean gillnet fisheries from New York to North Carolina." Although the mid-Atlantic harbor porpoise take reduction team was originally to have addressed mortality of bottlenose dolphins, the Team was directed by the NMFS to focus its efforts solely on harbor porpoise. In 1997, the Team recommended that by January 1999, the NMFS should convene a team to address mortality of bottlenose dolphins.

In 1999, The HSUS sent a letter to NMFS notifying them of our growing concern that they had not yet convened a team for bottlenose dolphins, despite repeated promises to do so. We received a commitment from NMFS to convene a Team in the fall of 2000, following completion of expanded data gathering efforts. In the summer of this year, NMFS began meeting with stakeholders to share with them information it had gathered pertaining to the structure of the stock, with updated and dramatically larger population assessments, and higher estimates of fishery-related mortality. This team has had a number of meetings postponed and has not yet met, though it is scheduled to do so in November. The HSUS hopes that the NMFS will abide by its agreement to convene a take reduction team. We would like to avoid litigation as a means of enforcing their statutory obligation to protect bottlenose dolphins.

Alaska Steller Sea Lion Team

In its report to Congress on activities undertaken in 1996, the NMFS states that they had not yet convened this team; however they stated "NMFS expects to convene this team to address incidental takes of Steller sea lions in Alaska Commercial fisheries. The team will be facilitated by Mediation Services, Seattle, Wa." As of the date of this testimony in October 2001, this team has still not been convened, despite ongoing population declines and contributing mortality from fisheries interactions.

Summary of Section 118 Implementation

It is troubling that, without litigation or threat of litigation, the NMFS has shown reluctance to abide by its legal responsibilities. Where take reduction teams have faltered, it is because the NMFS has undermined their functioning by bowing to political manipulation of the system that results in encouraging delay of action or in taking inadequate actions, which is then followed by the necessity of seeking assistance of the courts to force the agency to do its job. Indeed, The HSUS has been a plaintiff in two lawsuits pertaining to inaction on take reduction mandates.

The 1994 Amendments put in place a system that was designed to allow conservationists, fishermen and scientists to join with government managers to develop plans that reduce mortality of marine mammals consistent with the mandates of the MMPA. This system CAN work. The illustration provided by the Pacific Offshore Cetacean Take Reduction Team is, in part, an example of this. Where the system has failed, it is generally not as a result of an inability of stakeholders to comprehend the problem and work collaboratively to develop a solution.

Where the failure to convene teams or to implement plans is a result of funding and personnel insufficiency, the NMFS must seek and Congress should grant adequate funds. But funding alone does not seem to explain the failure of the NMFS to take action on take reduction plans. Some of the recommendations of take reduction teams would cost the agency nothing. For example only in October 2001 did the NMFS finally act on a 1999 recommendation by the Atlantic Large Whale team to remove 7/16" line from a list of technology options designed to reduce risk. Also litigation was necessary to force publication of the take reduction plan for harbor porpoise, although the plan had been largely complete for over a year prior to the suit.

The delays also undermine the confidence of Team members in the take reduction process. It is arduous work for diverse stakeholders to develop a plan that all can agree is likely to be effective and is acceptable to all interested parties. It is frustrating to have this hard work end with the NMFS refusing to publish a plan, often for years, with little or no explanation for the delay. Additionally, failure to enforce take reduction plan mandates further undermines the likelihood of the plan succeeding. The take reduction team process was designed to reduce the need to use lobbying and litigation as management tools. Instead, delays have forced both the fishing industry and conservation groups to use the very tools that the process was designed to obviate, further weakening confidence in the efficacy of the process.

The failure of the NMFS to meet its statutory obligations leads to a waste of resources that must be consumed by legal fees, lobbying efforts and oversight hearings. More importantly, the failure to meet statutory obligations under the MMPA has lead to a needless waste of animals' lives.

Abundant Pinniped Populations

While we understand that this issue is to be addressed in another Panel before the Subcommittee, The HSUS would like to take this opportunity to state that we believe that existing provisions in the MMPA are adequate to address situations of perceived conflict between humans and pinnipeds and concerns that pinnipeds are eating endangered fish species. Specifically, Section 109 and Section 120 were enacted to provide a forum for addressing these concerns and are a precautionary means of addressing conflicts. The HSUS has some grave concerns with portions of Section 120 and its implementation, but at the very least, it provides some checks and balances. We believe that there is no need to amend the MMPA to allow additional authorizations for the

intentional lethal removal of pinnipeds by state and federal resource agencies or by private citizens. In particular, we are concerned that if private citizens, including fishermen, are provided with any authority to intentionally kill marine mammals, we will merely see a dramatic increase in the wounding and maiming of hundreds of marine mammals.

In May 1999, Yale University completed a survey entitled "American Perceptions of Marine Mammals and their Management." In this, they found that three fifths of Americans disapproved of reducing populations of seals and sea lions and more than *ninety percent* opposed the use of lethal practices such as shooting or poisoning seals and sea lions as a means of reducing conflicts even though these methods were described as being the least expensive option. Clearly the American people would not support any changes to the MMPA that would broaden the use of lethal forms of managing conflicts. We agree with many of the comments made by the Ocean Conservancy in their testimony, particularly the need for innovative and targeted research to develop non-lethal deterrents that can prevent interactions while posing little risk to the pinnipeds or non-target organisms.

Native Co-Management

The 1994 Amendments to the MMPA provided greater authority for the NMFS to enter into agreements with native tribes and Alaskan natives to co-manage stocks of marine mammals, particularly those in Alaska. The HSUS has always supported the involvement of stakeholders in the process of determining management programs. We are, however, concerned that the co-management process is NOT an inclusive process. Meetings between native groups and the US government are not open to attendance by members of the public, nor is the public allowed to comment on the agreements prior to their going into effect. The NMFS, as can be seen in our testimony about take reduction teams, clearly does not always represent the public's interests and opinions. Problems have arisen in the co-management of marine mammal stocks. We note a number of examples from the 2001 Alaska Marine Mammal Stock Assessments, published by the NMFS.

Endangered Steller Sea Lions have a PBR of 208. This stock continues to decline. There are no data on native subsistence hunting provided since 1997. In that year, natives killed 353 animals from this declining stock, and we have no way of knowing how many were killed in the past 4 years. This is simply unacceptable. Similarly, spotted seals are hunted by natives with no harvest data available since 1995. Another example, of which Congress is no doubt aware, is the crisis that arose for beluga whales in the Cook Inlet in Alaska, whose population was decimated by native hunting. While this situation has received a great deal of attention, and management actions have halted the heavy hunting; beluga whales in the Eastern Bering sea stock are also hunted in levels above their PBR. These belugas have a PBR of 129, with an estimated annual average of 121 killed by native hunters. This is perilously close to the PBR and, in fact, in four of the five years between 1993 and 1997 (the standard period used by NMFS to obtain annual averages), PBR was exceeded by native hunting. We do not know how many may have been killed since 1997. The stock assessments state that for virtually all marine mammal stocks hunted by natives, estimates of native hunting are underestimates.

Without outside input to and review of the co-management process, we cannot hope to ensure that management agreements between the hunters and the government are adequately protective of marine mammals stocks. The HSUS strongly supports the inclusion of conservation interests in

meetings and discussions pertaining to co-management agreements and believes that the public should have a right to comment on these agreements before they are enacted.

Public Display

Export Permits

The MMPA should be amended to restore the requirement for a permit to export marine mammals for the purpose of public display, scientific research, and enhancing the survival or recovery of a species or stock. The 1994 Amendments removed this requirement and required only a 15-day notification to the NMFS or Fish and Wildlife Service (FWS) and a determination that a receiving facility meets standards comparable to those required under the Animal Welfare Act (AWA) and MMPA. The HSUS opposed these amendments, as we had serious concerns about the ability of the agencies under such a short-notice regime and without public input to ensure the well-being of marine mammals leaving this country for foreign facilities not under the jurisdiction of U.S. law.

In several instances since 1994, captive cetaceans, pinnipeds, and sea otters have been exported to countries such as China and Japan to literally unknown fates. One of the most well-known exports under the new provisions was that of Keiko, the killer whale of "Free Willy" fame. Ironically, the Alliance of Marine Mammal Parks and Aquariums (Alliance) vigorously protested this export, when in fact the Alliance was instrumental in fashioning the minimal export provisions under which Keiko was sent to Iceland from Oregon. While The HSUS believes this export would have qualified for a permit under the pre-1994 provisions, we point to this example in order to demonstrate that it is precisely *because* the law should be equally applied to all, that the law must be strong.

The current export requirements, which include the 15-day notification and a letter of comity from the receiving nation, have proven woefully inadequate in protecting captive marine mammals leaving U.S. jurisdiction. National agencies all too frequently provide letters of comity with no substance underlying them, yet as a diplomatic matter, the U.S. agencies must accept these letters. The permit process, which includes public notice and public input through comments, allows a greater - and more protective - degree of scrutiny of a receiving facility and the laws to which it is subject.

On-Site Inspections to Determine Comparability

Under the 1994 Amendments, foreign receiving facilities must demonstrate that they meet standards that are comparable to those under the AWA. However, the Animal and Plant Health Inspection Service (APHIS) has concluded that facilities may demonstrate this solely through providing the agency documentation - affidavits and photographs - rather than by the agency conducting an on-site inspection. APHIS has on a number of occasions stated that it does not have the authority or budget to conduct such on-site inspections nor the authority to require foreign receiving facilities to cover the expense of an on-site inspection. This authority or lack thereof is not clear from the language of the AWA or its regulations or from the language of the MMPA. Therefore, the MMPA should be amended to clarify in Section 104(c)(9) that the determination of comparability must be made through first-hand knowledge - that is, on-site inspections - by the relevant U.S. agency. Otherwise the determination is in essence being made by the receiving facility itself, through the documentation it chooses to provide to APHIS, which is a clear conflict of interest.

The Marine Mammal Inventory Report (MMIR)

The U.S. is one of the only countries in the world with legislation requiring the maintenance of an inventory of marine mammals held in captivity. Other nations without such a requirement sorely feel the lack. Until recently, for example, Mexican public interest groups and the Mexican government had no idea how many captive dolphins were held in their country. They had no idea what the mortality, birth, or survivorship rates were. Through the efforts of non-governmental organizations, an inventory was painstakingly put together that demonstrated that the situation for captive dolphins in Mexico is relatively grave. There are a far greater number than interest groups or the government were aware of (over 90 bottlenose dolphins) and the origins of many were controversial (e.g., wild-caught from unstudied populations, traded from other countries without adequate paperwork). Mortality rates in some facilities were excessive. Without an inventory, the status of captive marine mammals can be impossible to determine.

Again, Congress specifically recognized the specialized nature and needs of marine mammals when it passed the MMPA in 1972. This nature and these needs have not changed in 30 years - marine mammals are particularly vulnerable when removed from their natural, marine habitat and placed in captivity. The example of other countries emphasizes why inventories are not only precautionary but also necessary to ensure the humane treatment of these animals in captivity. Government biologists used the data found in the MMIR in 1995 to determine the survivorship rates of various species commonly found in marine parks and aquariums - this analysis determined that while pinnipeds survived well in captivity, captive bottlenose dolphins at best matched the survivorship of their free-ranging counterparts and captive orca survivorship rates were depressed compared to those of their wild cousins. This begs the question of what causes mortality in captive dolphins and why these mortality sources prevent their survivorship from surpassing that of free-ranging dolphins - it certainly begs the question of why captive orcas do not survive as well as or better than wild orcas. These inventory data are vital to our understanding of the trade in marine mammals as well.

There is no good argument for abandoning the MMIR.

Traveling Marine Mammal Shows

The MMPA should be specifically amended to prohibit traveling shows (e.g., circuses, portable performances) featuring marine mammals. Recently, Mundo Marino, a traveling dolphin show based in Colombia, and the Mexican Suarez Brothers Circus, featuring performing polar bears, have sought entry into Puerto Rico. NMFS disallowed the entry of Mundo Marino but the FWS issued an import permit to the Suarez Brothers Circus earlier this year, after APHIS approved the circus' facilities. APHIS has cited the circus multiple times since June for violations of AWA regulations and Puerto Rican authorities charged it with cruelty to the bears in August. The cruelty case hearing is now scheduled for early December.

Marine mammals are not suited to traveling shows. Their care and maintenance requirements, as evidenced by the separate and detailed regulations in 9 CFR Subpart E, are highly specialized. Providing adequately for them "on the road" is impossible. The agencies clearly believe that the current provisions of the law provide them with inadequate authority to prohibit such shows. Therefore, the law should be amended to make this authority clear. Traveling shows featuring

marine mammals clearly violate the spirit of the MMPA, which is designed to conserve species and stocks and ensure humane treatment of these animals. It is time for the letter of the MMPA to match this spirit when it comes to traveling marine mammal shows.

Captive Marine Mammals and the National Marine Fisheries Service

APHIS, under the AWA, has not demonstrated that it can adequately ensure the humane treatment and welfare of marine mammals on public display. For example, APHIS, after taking more than three years to finalize the regulations for the operation of swim-with-the-dolphin (SWTD) facilities, suspended its enforcement only six months later, in April 1999. It is now October 2001 and regulations for these specialized facilities are still not in place. The special aspects of SWTD interactions, which add an additional element of stress to animals already stressed by confinement, remain unregulated in the United States, putting this country on a par with such developing nations as the Dominican Republic and Anguilla in the Caribbean and Palau in the South Pacific, which have unregulated SWTD facilities. The failure of APHIS to expedite the review and reinstatement of these regulations (let alone its failure to finalize them promptly in the first place) emphasizes its inability to address the specialized needs of captive marine mammals.

As another example, APHIS approved and licensed the Suarez Brothers Circus, even though a number of problems were evident in the documentation that the circus provided the agency. Once the circus was on U.S. territorial soil, some of these same problems led APHIS to issue citations for violations of AWA regulations, some of which were apparently never corrected and led to the filing of cruelty charges by Puerto Rican authorities. Given that some of these violations were evident in the circus' documentation prior to licensing, it is difficult to understand why APHIS licensed the circus in the first place, at least unless and until these violations were corrected.

APHIS has limited expertise among its staff in the biology and handling of marine mammals. Its veterinary inspectors receive some training regarding the specialized needs and regulations for these animals, but this training is sometimes neglected entirely and is often inadequate. Facilities are allowed numerous opportunities to correct violations and in some instances, violations are never corrected. APHIS is responsible for implementing and enforcing the AWA for a broad range of species, both exotic and domesticated. The specialized biology and ecology (and captive maintenance requirements) of marine mammals, specifically recognized by Congress when it passed the MMPA, overburden this already overburdened agency.

In 1993, The HSUS testified before the Senate Committee on Commerce, Science and Transportation that NMFS, in contrast to APHIS, has the expertise and infrastructure to ensure the humane treatment of captive marine mammals. What NMFS lacks in veterinary staffing, it can acquire. It merely makes sense that marine mammal species, under the jurisdiction of NMFS (and the FWS for polar bears, walruses, manatees, and sea otters) when wild, should continue to be under the jurisdiction of NMFS when captive - they do not transform into livestock merely by virtue of entering a tank, pen, or cage. It seems abundantly clear that APHIS is stretched very thin already. It also seems clear that the public display industry's confidence, expressed during the 1993/1994 reauthorization, that APHIS and the AWA could adequately protect captive marine mammals was misplaced. We therefore maintain our original position that jurisdiction over captive marine mammals should be transferred to NMFS (and FWS for the four species under its authority), with an appropriate addition of marine mammal veterinarians to its staff (and the funding necessary to hire them).

Prohibit the Capture From the Wild of Marine Mammals For Public Display

The U.S. public display industry frequently points out to the public that it has not captured any cetaceans from the wild since 1993. It has not captured certain cetacean species for far longer than that. Other species' collection numbers have also been maintained for years (and in some cases, decades) through captive breeding, imports/transfers, or the retention of unreleasable stranded animals, rather than through wild captures. Given this successful maintenance of captive populations without removing animals from the wild, The HSUS believes it is time for the MMPA to be amended to prohibit this extraordinarily disruptive, traumatic practice.

Sport Hunting of Polar Bears

The HSUS requests Congress to maintain the strict prohibition on the sport/trophy hunting of polar bears in Alaska. The entire MMPA is based on the understanding that marine mammals belong to the nation as a whole - that they are held in public trust. The prohibition against take is universal, as it should be - the exemptions are for purposes that serve the public good. To allow exemptions for personal use is counter to the spirit of this ground-breaking legislation. In addition, The HSUS believes commercial sport hunts provide a dangerous incentive to over-exploit this vulnerable and naturally rare species, as was historically the case. Sport hunting and its negative impacts on polar bear populations were among the primary reasons the five polar bear nations (Denmark [for Greenland], the Russian Federation [then the USSR], Norway, Canada, and the U.S.) originally negotiated and signed the 1973 Agreement on the Conservation of Polar Bears.

At this time, Canada continues to be the only country that allows the sport hunting of polar bears under the 1973 Agreement. In 1994, Congress agreed to an amendment that allowed the import into the U.S. of trophies legally taken in Canada. The HSUS opposed this amendment, partially because we believe the hunt in several populations of Canadian polar bears was (and continues to be) unsustainable - allowing the import of trophies would provide a strong incentive for Canada to maintain or increase already unsustainable quotas because more American hunters would seek to purchase subsistence hunt tags from Canadian Inuit.

Demonstrating our concerns, the FWS approved the M'Clintock Channel polar bear population for imports under the 1994 Amendments. Earlier this year, the agency published an emergency rule disapproving M'Clintock Channel because a recent study by the Canadian authorities indicated that there were far fewer bears than originally estimated, making the quota not only unsustainable, but actually an extirpation risk for the population. Some of the population data used to calculate this new population estimate were apparently available to the Canadian authorities as early as 1978. In addition, the population estimate was always rated as "poor" and even after the results of the first two years of a three-year study (1998, 1999, and 2000) showed that there were almost certainly far fewer bears in the population than previously estimated, Canada did not change the quota until the study's final year of results was analyzed. (The 1998/1999 hunting season, therefore, removed nearly 10% of the population and the unfulfilled quota was for more than 10% of the population.) In short, managers could have and should have foreseen the actual status of the population as early as 20 years ago and certainly two years ago.

The HSUS has always been critical of the potential for mismanagement under Canada's management regime. The situation in M'Clintock Channel is a classic example of a worst-case

scenario under this regime, which, *inter alia*, relies on population estimates that are qualitatively rather than quantitatively characterized. The quota for this population was driving the M'Clintock Channel bear population inexorably toward extirpation for several years before the regime was able to detect this trend.

It is impossible to know whether those populations that the FWS has not approved for import but which are still subject to legal hunts under Canadian law are experiencing similar negative impacts because of hunting under Canada's management regime. If they are, this reflects on Canada's entire management program. As for those six populations currently with full FWS approval for import, their status is arguably just as questionable, as they are being managed under the same regime. Given how long M'Clintock Channel's dire situation escaped Canada's notice, and given the uncertain quality of some of the population data from the other approved populations, there is simply no assurance that any polar bear population in Canada is being managed sustainably.

The HSUS believes strongly that the amendment allowing trophies to be imported should be repealed. Polar bears are uniquely unsuited to being sport-hunted. Establishing accurate population estimates and life history parameters upon which commercially-driven hunts can be sustainably based is extremely difficult, given their remote and marginal habitat.

ADDITIONAL RECOMMENDATIONS TO IMPROVE PROVISIONS OF THE MMPA

Up to this point in our testimony, we have dealt with the implementation of provisions put in place in the 1994 Amendments. There are a number of issues, not considered in the amendments that affect their implementation.

Recreational Fisheries

Meetings of the mid-Atlantic Take Reduction Team have brought to light the issue of recreational fisheries interacting with marine mammals. Section 118, which focuses on commercial fisheries, does not provide jurisdiction over recreational fisheries. Gillnets that are used to catch bait for personal use are similar in design and method of operation to that of commercial gillnets. Both commercial fishermen and scientists working in the area have observed dolphins and porpoises caught in these nets that are not under the jurisdiction of Section 118 of the MMPA. Recreational lobster gear poses a risk to whales that is no less than that posed by commercial lobster pots, yet may not receive the same degree of oversight.

We believe that there should be a mechanism for quantifying the nature and extent to which recreational fisheries interact with marine mammals when they use gear that is similar in type to that of commercial gear known to kill or injure marine mammals. Furthermore, we believe that recreational fisheries utilizing gear types similar to those used by commercial fisheries, and known to interact with marine mammals, should be subject to the same restrictions required of commercial fisheries.

Quantifying the Impact of Fishery Interactions

The funding for the observer program is insufficient to provide anything but rudimentary observer coverage in many fisheries. Stock assessment surveys, which appear to be mandated by the MMPA, are simply not done. The HSUS believes that this is a significant problem that results in an

underestimate of the number or impact of mortalities in fisheries that may interact with marine mammals. It can be addressed by designating appropriations for this purpose. For example, since the 1994 Amendments, stock assessments for marine mammals in and around the Hawaiian Islands acknowledge that there has been no effort directed to determining the population abundance of most stocks and there is no observer coverage on most fisheries in this area. We have no way of knowing how many animals there are, let alone whether commercial fisheries may be having a negative impact on their populations. Resources must be directed to assess stocks and fisheries interactions in this area. Additionally, many gillnet fisheries in Alaska have little or no observer coverage. The extensive Atlantic longline fleet, which is known to seriously injure hundreds of animals each year, has less than 5% observer coverage to monitor its operations and, in some areas or times when interactions may occur, there is virtually no observer coverage. Because of a lack of resources there are a number of fisheries with a likelihood of killing marine mammals but about which we know little. Until we can provide additional and more uniform observer coverage, we are unlikely to be able to understand the extent of fishery interactions with marine mammals. This results in an underestimate of mortality and an inability to track the efficacy of take reduction measures.

The NMFS needs to request, and Congress needs to appropriate, sufficient funding to ensure an adequate observer program that will be able to detect sources, levels and trends in marine mammal mortality.

Enforcement of Provisions of Take Reduction Plans

Although we have focused much of our testimony on the glacial speed of the NMFS response to MMPA mandates to convene take reduction teams and publish take reduction plans, there is also a problem that arises with enforcement of the plans once they are published.

Fishermen in parts of North Carolina have routinely refused to take federal observers on board, with absolutely no consequence resulting from their having violated the law. This provides disincentive to other fishermen who are law abiding and it means that the data that are gathered do not provide a random and representative look at the fishery's interactions with marine mammals. The result of this skewed picture is that we may either underestimate the number of animals killed, to the detriment of the marine mammal population; or we may overestimate the number of animals killed, to the detriment of the fishery. Additionally, in a number of fisheries, fishermen have been documented by federal observers to be fishing in closed areas, and killing marine mammals. No enforcement action has been taken against them. Again, this is a disincentive to those fishermen who are obeying the law and it undermines the effectiveness of the take reduction plan. These are but two examples of a broader problem.

It is paramount that the NMFS examine the compliance issues that have come to light in these teams and take action against violators. Where implementing regulations are unclear or other internal administrative policies prevent action, these situations must be remedied. Furthermore, it is urgent that Congress provide adequate funds to both the NMFS and Coast Guard to ensure that their resources are sufficient to enforce compliance with laws and regulations.

Additional Funding Issues

In earlier hearings, The HSUS has pointed out that MMPA implementation funds are routinely

robbed for so called "base funding" shortfalls. That is, the NMFS has insufficient funds to pay for operating costs and permanent staff positions and, rather than fund recommendations by take reduction teams for additional research or personnel, uses these funds to pay for general operating budgets. This is an unacceptable practice.

We urge the NMFS to clearly and accurately depict its needs for on-going operating costs and we further urge that Congress appropriate sufficient base funding to meet these needs. Funds identified for implementing Take Reduction Team recommendations and for conducting research that helps us understand and reduce levels of mortality in marine mammals must be used for their intended purpose.

SUMMARY

In summary, the 1994 Amendments put in place a means of obtaining many of the goals outlined in the MMPA when it was passed in 1972. We can now gauge the impact of human-related actions on marine mammal populations and we have a process to help mitigate adverse impacts. In particular the approaches taken in the use of PBR and the zero mortality rate goal, should stand as a measuring stick to the MMPA's commitment to reduce or eliminate threats to marine mammal populations. Stakeholders are now assured a role in management decisions. In some cases there are ongoing adverse impacts, as is the case in some stocks hunted by natives or sport hunters, marine mammals killed in recreational fisheries, and where marine mammals in captivity have lost important protections; however, clarifications to the MMPA would address many of these problems. We also believe that the federal government should maintain management authority for marine mammals, rather than abrogating to states or user groups. Lethal taking of marine mammals should remain prohibited. Additional problems in the implementation of the MMPA can be addressed by careful attention to enforcement of existing requirements; by demanding Agency compliance with existing provisions of the MMPA, including deadlines for action; by ensuring participation of multiple stakeholders in all decision making fora; and by ensuring adequate funding to carry out the intent of the provisions of the MMPA.

The HSUS would not oppose a straight reauthorization of the MMPA. The HSUS would also support extremely limited and non-controversial changes that are intended to clarify the MMPA's obvious conservation intent. Many of the concerns we have expressed can be addressed through the allocation of sufficient resources; by agencies taking overdue regulatory actions or making interpretations of the MMPA that allow stricter enforcement of its provisions; and by ensuring support by the agencies and this Congress for action by inclusive bodies of stakeholders acting to resolve or prevent problems.

The 1999 Yale University study of "American Perceptions of Marine Mammals and their Management" by Stephen Kellert and colleagues concludes:

"The results of this study largely revealed strong support for marine mammal protection among the great majority of Americans... Most Americans indicate a willingness to render significant sacrifices to sustain and enhance marine mammal populations and species. Despite concern for various commercially important ocean activities, including commercial fishing and oil and gas extraction, these interests did not supercede the public's inclination to protect marine mammals. Most Americans consistently indicated a desire to modify or alter these and other human activities in the marine environment to protect marine mammal populations and species, even if it necessitated sacrifices on society's part. Americans further affirmed the

importance of maintaining the Marine Mammal Protection Act.

With the passage of the MMPA in 1972, Congress granted marine mammals a special protection and status that was, and still remains, the desire of the American people. The 1994 Amendments helped objectify many of its lofty goals. The HSUS urges you to keep the MMPA strong in its protection of marine mammals.